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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 308

FLOYD DINAN, FRANK POPLEES, also known as FRANK DAY, true name FRANCIS W. DAY, and ALBERT BRICKER,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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August, 1962.

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Floyd Dinan, Frank Poplees, also known as Frank Day, true name Francis W. Day (hereinafter referred to as Day), and Albert Bricker, your petitioners, pray that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York (Appendix A, *infra*), which affirmed, by a vote of four to three, a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which affirmed judgments of the County Court of the County of Westchester, State of New York, convicting all three petitioners of conspiracy to violate Sections 986 and 987, New York Penal Law, prohibiting bookmaking and policy, and convicting Dinan and Bricker in addition of substantive violations of bookmaking.

The judgments were stayed and bail continued pending the determination of this petition on July 2, 1962 by Mr. Justice Harlan.

Opinions Below

The prevailing and dissenting opinions of the Court of Appeals of the State of New York (Appendix B, *infra*), are reported at 11 N.Y. 2d 350. The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York (Appendix C, *infra*), is reported at 15 App. Div. 2d 786.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 17, 1962, and its remittitur was amended by it on June 12, 1962 in order to certify that questions under the Constitution of the United States were presented to, and necessarily passed upon, by that Court (Appendix A, *infra*, p. 24).

The jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1257(3).

Questions Presented

1. Does this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, require the invalidation of State convictions obtained by court-ordered wiretapping in violation of Section 605 of the Federal Communications Act?

2. Do State convictions based upon evidence consisting of court-ordered wiretaps of telephone conversations claimed to be between the defendants, pursuant to a New York statute permitting State Judges to authorize wiretapping, violate rights, privileges and immunities of the defendants granted by so much of the Supremacy Clause (Article VI, Clause 2) of the Constitution as provides

that State judges shall be bound by the federal law, and by the Privileges and Immunities Clause of the Fourteenth Amendment?

3. Do State convictions based on court-ordered wiretap evidence violate the defendants' rights under the Due Process of Law and Equal Protection Clauses of the Fourteenth Amendment?

4. Should this Court's holding in *Schwartz* v. *Texas*, 344 U. S. 199, be reconsidered?

5. Should this Court's holding in *Olmstead* v. *United States*, 277 U. S. 438, be reconsidered?

6. Does the refusal of the court, after a State criminal trial has commenced, to permit certain of the defendants to replace a lawyer then representing them and others with a new lawyer, when the first lawyer says that he apprehends a possible conflict of interest between his clients, and the new lawyer is ready to proceed forthwith without delaying the trial, deny to those defendants desiring new counsel the right to representation by counsel of their own choosing as protected by the Fourteenth Amendment?

7. Is a defendant in a State criminal trial deprived of effective representation by counsel, if his lawyer's application during trial, upon the ground that he apprehends a possible conflict of interest, that certain other defendants until then represented by him be represented from that point on by another attorney, who is present and ready to proceed forthwith without delaying the trial, is denied?

Statutes and Constitutional Provisions Involved

Title 47, U.S.C., § 605 (Federal Communications Act):

"Unauthorized publication or use of communications • • • no person not being authorized by the sender

shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *."

Title 47, U.S.C., § 501 (Federal Communications Act):

"General penalty

Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than $10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than $10,000 or by imprisonment for a term not exceeding two years, or both."

New York Code of Criminal Procedure, § 813-a (McKinney's Consolidated Laws, Book 66, Part 3, p. 156):

"Ex parte order for interception, overhearing or recording

An ex parte order for the interception, overhearing or recording of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone number or telegraph line, and particularly describing the person or persons whose communications are to be intercepted, overheard or recorded and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by a justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for intercepting, overhearing or recording, or directing the interception, overhearing or recording of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same."

New York State Constitution, Article 1, § 12 (McKinney's Consolidated Laws, Book 2, Part 1, p. 481):

"The right of the people to be secure against unreasonable interception of telephone and telegraph

communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

Constitution of the United States, Article VI (Clause 2):

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Constitution of the United States, Amendment XIV, Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

New York State Constitution, Article 1, § 6 (McKinney's Consolidated Laws, Book 2, Part 1, p. 225):

"* * * and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions * * *."

New York Code of Criminal Procedure, Section 8 (McKinney's Consolidated Laws, Book 66, Part 1, p. 14):

"Rights of a defendant in a criminal action

In a criminal action the defendant is entitled * * *

2. To be allowed counsel as in civil actions, or he may appear and defend in person and with counsel; * * *."

Statement of the Case

All three petitioners were convicted on June 20, 1960 of conspiring from October 1955 to December 8, 1955 to violate Secs. 986 and 987, New York Penal Law, prohibiting bookmaking and policy, a misdemeanor (New York Penal Law, Sec. 580). Dinan and Bricker were also convicted on indictments charging substantive violations of bookmaking, all misdemeanors. They were sentenced as follows: Dinan, four months imprisonment, and fines totaling $4,000; Day, six months imprisonment, and a fine of $500; Bricker, six months imprisonment, the execution of which was suspended, and fines totaling $1,000.

As to the Questions Concerning Wiretapping

Pursuant to Section 813-a of the New York Code of Criminal Procedure, court orders were signed which purported to authorize the tapping by the Westchester County Sheriff's office of telephones at eight or more different locations in the City of Yonkers. Thereafter Deputy Sheriffs tapped such telephone lines for approximately two months in the latter part of 1955, listened to the conversations taking place over such lines, and recorded the conversations on reels of tape. These Deputy Sheriffs testified

concerning such wiretapping at the trial herein, and identified the reels of tape, which were placed in evidence over objection, and hundreds of conversations thereon were then played on a playback machine, and testimony was adduced to identify the voices of the participants in such conversations. These recordings disclosed that the participants in the conversations during the time the telephones were tapped were engaged in taking bets on sporting events. The voices of Dinan and Bricker (among others) were each identified by respondent's witness in about fifty of such conversations, and the voice of Day was identified in four conversations. As a result of what they heard over the wiretaps the Deputy Sheriffs conducted simultaneous raids on the various premises involved, secured some corroborating documentary evidence, and apprehended a number of persons.

It is undisputed that the wiretaps constituted the basic evidence in the case, and without them the convictions could not have been obtained. Their admission in evidence was objected to at the trial as being in violation of your petitioners' constitutional rights under the Supremacy Clause and the Fourteenth Amendment (R. 453-455, 462, 477, 1128, 1130),* and this was also argued and briefed in the Appellate Division and the Court of Appeals (p. 24, *infra*).

As to the Questions Concerning the Right to Counsel

The indictments against petitioners were consolidated for trial. The trial commenced on February 4, 1960 and continued for eight weeks until March 31, 1960 when the jury's verdict was returned. A Mr. Cribari appeared as attorney for the three petitioners (as well as for two other defendants as to whom the jury disagreed). He had represented them for a considerable period of time prior to the trial. February 4 and February 5 were devoted to selecting the jury. February 6 and 7 were Saturday and

* References are to pages of the certified printed Record.

Sunday and the trial was in recess. The District Attorney's opening statement was made on February 8th, from which it appeared that the evidence to be presented against petitioners Dinan and Bricker would differ in character from that to be introduced against Day.

Some testimony was taken, and at the opening of the day on February 10th Mr. Cribari informed the Court that he had gotten a stenographic transcript of the prosecutor's opening statement in order to study it, and that the prosecutor had then permitted him (for the first time) to examine certain typewritten transcriptions of the wiretaps to be offered in evidence, as a result of which he had come to the conclusion that "There may very well be a conflict of interest between several of the defendants whom I represent" (R. 274-5).

He stated that he had advised his clients that it was to their interest that certain of them be represented by other counsel, and that petitioners Dinan and Bricker (and another person he was representing named Castellucci) "desire to have separate counsel and that they have employed Mr. Joseph Delaney of the New York Bar who is in the courtroom to act in their behalf". The Court was requested to examine the jury as to whether any of them were acquainted with Mr. Delaney, and after such a *voir dire*, to permit Mr. Delaney to be seated at the counsel table and to represent Dinan and Bricker (and Castellucci) from that point on (R. 275). Mr. Cribari said that the reason for his concern was that he had to determine whether one or more of the defendants ought to take the stand to testify in his own defense, and that if he *(sic)* did so he might have to testify to something that might injure one of the other defendants (R. 277). Although no reason was advanced why this change of counsel ought not be permitted, the application was nevertheless denied, and due exception was taken to its denial (R. 278).

At the afternoon session Mr. Cribari requested that Mr. Delaney be permitted to sit with him at the counsel table

and assist him. The court, after ascertaining from the jurors that none of them knew Mr. Delaney, granted this last application, stipulating however that Mr. Delaney would "not be permitted to participate in the trial on behalf of any of the defendants" (R. 287).

At the conclusion of the testimony counsel moved for a mistrial because of the denial of the application for the substitution of Mr. Delaney (R. 2183); and after the verdict written motions to set it aside were filed on behalf of Dinan and Bricker (R. 2468, 2471), on the ground that the refusal to allow them to be represented by counsel of their own choosing under the circumstances deprived them of a fair trial, and on behalf of Day (R. 2466), on the ground that the refusal to allow his counsel to withdraw as counsel for three other defendants, when it became apparent to him that there was a possible conflict of interest, deprived Day of a fair trial. The point that they were thus deprived of their constitutional rights protected by the Fourteenth Amendment was argued and briefed in the Appellate Division and in the Court of Appeals (p. 24, *infra*).

Reasons for Granting the Writ

As to the Questions Concerning Wiretapping

Questions 1, 2 and 3

The rationale of this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643, now requires a holding that court-ordered wiretaps of defendants' telephone conversations may not constitutionally be received in evidence against them in a State criminal trial. (New York has decided to apply the *Mapp* ruling to cases which, like the present one, were on appeal at the time of that decision; *People* v. *Loria*, 10 N. Y. 2d 368.).

In *Mapp* this Court said that evidence obtained by a violation of the Constitution was "by that same authority, inadmissible in a state court" (p. 655). It also said that it

was closing "the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right [the right to privacy free from unreasonable state intrusion], reserved to all persons as a specific guarantee against that very same unlawful conduct."

The Supremacy Clause (Article VI, Clause 2, United States Constitution) provides with respect to the Federal statutes that "the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 813-a of the New York Code of Criminal Procedure purporting to authorize official wiretapping is in direct conflict with Section 605 of the Federal Communications Act. Discussing this New York statute in *Benanti* v. *United States*, 355 U. S. 96, 105, this Court held that Congress did not intend to allow State legislation which would contradict Section 605 of the Federal Communications Act, and the public policy underlying that statute. It also said that "had Congress intended to allow the States to make exceptions to § 605, it would have said so." It repeated what it had said in *Nardone* v. *United States*, 302 U. S. 379, that the disclosure to the jury of the existence of the intercepted communication is itself a violation of the Federal statute (*Benanti* v. *United States*, *supra*, p. 100).

The New York statute requires *the action of the New York State judges themselves* in order to effectuate the violation of the Federal statute by court-ordered wiretapping. Although the State judges are specifically mentioned in the Supremacy Clause as being bound by the Federal law (which is to control their official acts, *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 340), it is their action in signing orders pursuant to the New York statute purporting to authorize wiretapping which results in the violations of the Federal statute.

There is therefore more involved here than a violation of "only a federal statute" (the quotation is from the

prevailing opinion in the New York Court of Appeals herein, p. 29, *infra*). There is a violation of the provision of the Supremacy Clause that the *State judges* shall be bound by the Federal law, and evidence so obtained is obtained by a violation of that part of the Constitution. (When the existence of the intercepted communications is again disclosed at the State criminal trial with the approval of the State judge presiding at the trial, who by authorizing such testimony thereby refuses to be bound by the Federal law, a further violation of the Supremacy Clause occurs.)

This is not the same as to say that every time a Federal statute is violated, the Constitution is violated; what petitioners say is that a State statutory scheme under which the judges sign orders purporting to authorize the violation of a Federal statute by enforcement officers, in order to secure evidence, gravely contravenes the Supremacy Clause of the Constitution and rights had by the petitioners thereunder.

It is true that *Mapp* v. *Ohio, supra,* was specifically concerned with a violation of the Fourth Amendment as carried over into the Fourteenth Amendment, and not with a violation of the Supremacy Clause of the Constitution. But the constitutional provision guaranteeing the citizens that the Federal law shall bind State judges (here a Federal law intended to protect the privacy of the citizens' telephone conversations) is not distinguishable on any basis from the right not to be subjected to an unreasonable search and seizure, insofar as the reception in criminal trials of evidence obtained by its violation is concerned.

Among the privileges and immunities of national citizenship protected by the Fourteenth Amendment against abridgement must surely be the right that the State judges be bound by the Federal law as required by the Supremacy Clause. And if a conviction is obtained by the State judges violating this part of the Constitution—as New York's wiretapping law purports to permit—the defend-

ants' conviction is without the due process and equal protection of the laws guaranteed by the Fourteenth Amendment.

In 1952 this Court held in *Schwartz* v. *Texas*, 344 U. S. 199 that wiretaps might be received in evidence in State courts; although their admission in evidence violated the Federal law, the Court "refused to overturn a state rule of evidence" (*Benanti* v. *United States*, *supra*, p. 106, footnote 19). In the *Schwartz* case the Court discussed, and leaned heavily, we respectfully submit, on *Wolf* v. *Colorado*, 338 U. S. 25 (*Schwartz* v. *Texas*, *supra*, p. 201) which had held that the states may—if they so desire—admit evidence secured even by means which would constitute an unlawful search and seizure under the Fourth Amendment.

In *Pugach* v. *Dollinger*, 365 U. S. 458, decided four months before *Mapp* v. *Ohio*, *supra*, this Court affirmed in a *Per Curiam* the denial of a Federal injunction against a State District Attorney to enjoin his use of court-ordered wiretaps at a New York State trial, citing *Schwartz* v. *Texas*, *supra*, and *Stefanelli* v. *Minard*, 342 U. S. 117. Mr. Justice Brennan concurred solely on the authority of *Stefanelli* v. *Minard*. The Chief Justice and Mr. Justice Douglas dissented. *Stefanelli* v. *Minard* had reiterated the traditional reluctance of the Federal courts to interfere *collaterally* in State judicial proceedings, and had held that a Federal injunction against the State authorities should not issue to preclude the use in a State court even of unconstitutionally seized evidence, again citing *Wolf* v. *Colorado*, *supra*.

But in *Mapp* v. *Ohio*, *supra*, the doctrine of *Wolf* v. *Colorado* was overruled. The right of privacy enjoyed by the citizens of the States may no longer be emasculated by the admission against them in State criminal trials of evidence obtained by its violation. This reasoning in *Mapp* should have eliminated *Schwartz* as an authority for sustaining convictions obtained by wiretapping, and should have eliminated so much of *Pugach* v. *Dollinger*, *supra*, as

had depended on *Schwartz*. Indeed, the dissenting opinion of Mr. Justice Harlan in the *Mapp* case itself pointed out (at p. 677, footnote 9)—apparently as an anomaly—in commenting on the drastic change wrought by the Court's sudden overruling of the doctrine of *Wolf* v. *Colorado*, that *Pugach* had relied on *Schwartz* and *Schwartz* had discussed and approved *Wolf* v. *Colorado*.

Nevertheless, the New York Court of Appeals in the instant case has declared (p. 30, *infra*) its determination to adhere to its rule of evidence admitting wiretaps as enunciated by it in *People* v. *Variano*, 5 N. Y. 2d 391, and followed in *People* v. *Dinan*, 7 App. Div. 2d 119, affirmed 6 N. Y. 2d 715 (ruling on a pre-trial attack on the indictment in the present case) "unless and until the Supreme Court decides otherwise." It believes, erroneously, we submit, that the *Schwartz* case is still viable, despite *Mapp*, and for this conclusion it cites *Williams* v. *Ball*, 294 F. 2d 94 (C. A. 2), certiorari denied —— U. S. ——, 7 L. Ed. 2d 526, a post-*Mapp* decision.

But *Williams* v. *Ball* was an application for a three-judge court, to enjoin the operation of the New York wiretapping statute. As the United States Court of Appeals there stated, the wiretapping had been completed and hence there was nothing left to enjoin. And, further, invalidity of a State statute which is occasioned only by the existence of a conflicting Federal statute, it said, was insufficient to authorize the empaneling of a three-judge court.

The petitioner in *Williams* v. *Ball* also sought a declaratory judgment of invalidity of the New York statute, but, as the United States Court of Appeals pointed out in a footnote to its opinion (294 F. 2d 94, 96), whether or not *Schwartz* v. *Texas* was still law, such declaratory judgment ought not issue, since, if *Mapp* overruled *Schwartz*, *Williams* could then review his State court conviction in this Court.

In his unsuccessful petition for certiorari to this Court to review that decision, *Williams* himself therefore found it necessary at times (Pet. No. 576, October Term, 1961, pp. 11-12, 19-20) to take the position adopted by the majority of the New York Court of Appeals in the present case, in order to attempt to justify collateral interference by a Federal court in State criminal proceedings. And *Williams* did not urge the constitutional argument concerning the State judges presented by the present petitioners.

The United States Court of Appeals did say in *Williams* v. *Ball* that it did not read *Mapp* as overruling *Schwartz*. But it is evident from what has been said above that that statement was unnecessary to its decision, and was *dictum*. And another panel of the same United States Court of Appeals in *Bolger* v. *Cleary*, 293 Fed. 2d 368, 370, certiorari granted, —— U. S. ——, 71 L. Ed. 2d 522, spoke of the "then prevailing doctrine [before *Mapp*] of * * * *Schwartz* v. *State of Texas*, 344 U. S. 199", and expressed its view that it was not clear whether that case continued to be law after *Mapp*.

Question 4

For reasons which have already been stated, petitioners contend that *Schwartz* v. *Texas*, *supra*, must be deemed to have been overruled along with the doctrine of *Wolf* v. *Colorado*. There are additional reasons why petitioners maintain that in any event *Schwartz* v. *Texas* ought to be reconsidered.

The Court in *Schwartz* v. *Texas* said that the introduction of the wiretapped evidence would itself violate Section 605, but it immediately added that enforcement of the prohibition of the statute can be achieved under the penal provisions of Section 501 thereof. But there have been no Federal prosecutions in the ensuing ten years of State officers, district attorneys, or judges, for procuring and introducing such evidence, although such officials in the interim have shown "an avid taste for violating the law"

(*Pugach* v. *Dollinger*, 365 U. S. 458, 460, dissenting opinion of Mr. Justice Douglas).*

In *Schwartz* this Court said that Congress did not intend to supersede the legislative power of the State when it enacted Section 605. But later, in *Benanti* v. *United States*, *supra*, this Court said with respect to Section 605 that Congress did not mean to allow State legislation which would contradict that section and its policy.

In *Nardone* v. *United States*, 302 U. S. 379, the Court pointed out that the verbiage of Section 605 constitutes a *plain prohibition* against any person intercepting telephone messages, and against any person divulging them, adding that "To recite the contents of the message in testimony before a court is to divulge the message." The Court also pointed out that the Congress may well have been moved by the same considerations as evoked the guarantee against practices and procedures violative of privacy embodied in the Fourth and Fifth Amendments, and that the policy of the statute may be to prevent officers from resorting to methods "deemed inconsistent with ethical standards and destructive of personal liberty." That language was repeated in the *Second Nardone Case*, 308 U. S. 338, 340, not as a possibility or probability, but as the definitive policy of the statute, described as being "an overriding public policy" based on broad considerations of morality and public well-being, and the principles applicable to unlawful searches and seizures—the exclusion of the fruit of the poisonous tree—were held to be applicable to the unlawful interception of telephone communications. If such was the Congressional policy, the conclusion reached in the *Schwartz* case is at odds with it.

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* In fairness, it should be noted that the District Attorney of New York County announced on November 14, 1961 that he would no longer use wire-taps in the present state of the law (New York Times, p. 1, November 15, 1961). But this is the exception.

If the language of Section 605 is to be accorded meaning we respectfully submit that it cannot reasonably be said—as was said in *Schwartz* v. *Texas*—that the Congressional prohibition is violated when the evidence is introduced in the State court, but at the same time the Congress did not intend to prevent the States from "authorizing" such violation of its prohibition.

Question 5

The reasons given up to this point for granting the writ do not depend upon any reconsideration by this Court of its decision in *Olmstead* v. *United States*, 277 U. S. 438, that wiretapping is not an unreasonable search and seizure forbidden by the Fourth Amendment.

However, petitioners do also respectfully submit that this Court ought to reconsider the *Olmstead* case, and now hold to the contrary, for the reasons stated by Mr. Justice Brandeis, Mr. Justice Holmes, Mr. Justice Stone, and Mr. Justice Butler dissenting in that case, and by Mr. Justice Frankfurter and Mr. Justice Douglas dissenting in *On Lee* v. *United States*, 343 U. S. 747.

Little, if anything, now remains of the reasoning of the majority of the Court in *Olmstead*. They pointed out that wiretapping involves no physical invasion of the curtilage of the victim's premises, since the wires are tapped at a point outside. But they conceded that the seizure of a letter in the hands of the post office would violate the Fourth Amendment, although involving no physical intrusion into the owner's premises. It was said, however, that the United States "takes no such care of telegraph or telephone messages" as of mailed matter, pointing to the Federal statutes protecting the privacy of mailed matter and controlling its delivery, and the absence of such protective statutes in the case of telephone or telegraph communications. That was true at the time. But such basis for distinction, assuming, *arguendo*, it was valid, no longer exists since the enactment of Section 605.

The Court in the *Olmstead* case also distinguished material things, papers, and "effects", from mere words, and several times emphasized the Amendment's protection as being intended to be given to tangible material effects. But this basis for the decision has also become obsolete. Compare *Silverman* v. *United States*, 365 U. S. 505, in which it was held that conversations overheard by a "spike mike" constituted evidence obtained by a violation of the Fourth Amendment.

It is significant, also, in this connection, that wiretapping is a general search for *evidence*. Search warrants have been restricted to contraband and to the instrumentalities of crime; and this Court has said that they may not issue for the purpose of putting the prosecution in the possession of mere evidence of crimes of which the prospective defendants are suspected. *United States* v. *Lefkowitz*, 285 U. S. 452, 464-465; *Gouled* v. *United States*, 255 U. S. 298, 310. The New York wiretapping statute (Section 813-a, Code of Criminal Procedure) provides in terms for the issuance of an order for the interception and recording of telephonic communications upon a showing "that there is reasonable ground to believe that evidence of crime may be thus obtained * * *". Such a procedure—even if not in conflict with a Federal statute—would not meet the test of reasonableness outlined in the above-cited cases. Hence, if *Olmstead* v. *United States*, *supra*, is reconsidered, the judgments here would call for reversal as having been obtained by an unconstitutional search and seizure (*Mapp* v. *Ohio*, *supra*).

As to the Questions Concerning the Right to Counsel

Questions 6 and 7

Dinan and Bricker had a right to be represented at all times by counsel of their own choosing. When they chose to be represented from a certain point on by Mr. Delaney, the court had no power to compel them to be represented instead by Mr. Cribari, absent any showing of prejudice to

the prosecution or detriment to the administration of justice. This amounted to *assigning* Mr. Cribari to defend them from that point on, over their objection, and despite their desire to be represented by other retained counsel who was ready to take over their defense without any interruption of the trial.

Day had the right to be represented by an attorney who was not burdened by representation of conflicting interests, or of persons whose interests the attorney believed might conflict with Day's—nothing less is "effective" representation by counsel. Dinan and Bricker also had this right. "The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Von Moltke* v. *Gillies*, 332 U. S. 708, 725.

The aftermath of Mr. Cribari's continuing to represent all three petitioners was that none of them took the stand in his own behalf; but as Mr. Cribari had indicated, such an important election might well not have been made by all if all had not been represented against their will by the same lawyer.

This Court has stated on a number of occasions that a defendant in a State criminal trial has an unqualified right under the Due Process Clause to be heard through his own counsel. Some of such statements appear in *Chandler* v. *Fretag*, 348 U. S. 3, 9-10; *Re Groban*, 352 U. S. 330, 332; *House* v. *Mayo*, 324 U. S. 42, 46; *Crooker* v. *California*, 357 U. S. 433, 439. The difference of opinion, which has existed with respect to whether one has a similar constitutional right to have counsel assigned in a State criminal case, has never existed with respect to the right to be represented by the attorney one desires to retain.*

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* And even as to the right to have counsel assigned as recently as June 4, 1962 in *Gilcon* v. *Cochran*, —— U. S. ——, 8 L. Ed. 2d 403, this Court granted certiorari and requested counsel to argue the question "Should this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, be reconsidered?"

In *Glasser* v. *United States*, 315 U. S. 60, this Court held that representation by an attorney who is compelled over objection to represent others does not meet the constitutional requirements. In that case it was also stated that the right to the assistance of counsel is too fundamental and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." It was also stated that the mere "possibility" of a divergence of interest having been brought home to the trial court required the court to refrain from embarrassing counsel in the defense of an accused by insisting that he concurrently represent such potentially divergent interests.

It is true that the *Glasser* case was an appeal from a Federal and not a State conviction, but the foregoing propositions stated therein have been considered by the courts of various States to be equally applicable to the right to counsel as protected by the Due Process Clause of the Fourteenth Amendment. *Matter of Fusco*, 304 N. Y. 424, 433; *People* v. *Robinson*, 42 Cal. 2d 741, 269 P. 2d 6; *People* v. *Bopp*, 279 Ill. 184, 116 N. E. 679; *State* v. *Brazile*, 226 La. 254, 75 So. 2d 856.

In *People* v. *Robinson*, *supra*, for example, it was held that, entirely apart from any factually apparent diversity of interest each defendant was entitled to the undivided loyalty and untrammeled assistance of his own counsel. In *People* v. *Bopp*, *supra*, it was said that once an attorney had stated to a court that a possible conflict of interest existed, his statement should be accepted, and that to require him to go further and to disclose the facts showing the conflict would be to compel him to disclose confidential communications.

The respondent has argued below that the principles enunciated in *Glasser* v. *United States*, *supra*, have no application, once the trial has commenced; that whether to permit the defendant to change his counsel during trial is

within the discretion of the trial court; that the defendant must show he was prejudiced by the denial of his right to counsel of his own choosing, and that petitioners have not made a sufficient showing of prejudice.* Certain decisions of the federal Courts of Appeals, which were cited for these propositions by the Appellate Division of the New York Supreme Court in this case (Appendix C, *infra*, p. 33), were all cases where the requested change of counsel would have disrupted the trial, and caused a postponement thereof. But in *United States* v. *Mitchell*, 137 Fed. 2d 1006, 1011, 1012, the then Circuit Court of Appeals for the Second Circuit expressed its view that a court would have no discretion to deny such an application if the change of counsel would not result in a delay or a continuance.

New York State Constitution, Article 1, § 6, and New York Code of Criminal Procedure, Sec. 8, guarantee to all defendants in criminal trials the right to counsel. If this right is withheld from those whose trial is in progress they are wrongfully discriminated against, and are therefore denied the equal protection of the laws. *Cf. Griffin* v. *Illinois*, 351 U. S. 12.

It is submitted that where no delay or continuance will result, as here, and there will be no prejudice to the prosecution, the right of the defendant to change his counsel during a State criminal trial, when he apprehends a possible conflict of interest, should be no more qualified than his right to choose his own counsel before the trial begins.

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* In a case where counsel suggests (p. 9, *supra*) that one of his clients ought to testify in his own self-interest, but that such testimony might incriminate one of his other clients, and subsequently calls no defendant to testify, it is hard to see how it would be possible to demonstrate prejudice from the Record. Yet it is manifest that at least one client may have been gravely prejudiced.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

RICHARD J. BURKE,
60 Wall Street,
New York 5, N. Y.,
Counsel for Petitioners.

August, 1962.

APPENDIX A

Judgment and Amended Remittitur of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of May, in the year of our Lord one thousand nine hundred and sixty two, before the Judges of said Court.

Witness,

THE HON. CHARLES S. DESMOND,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

REMITTITUR May 17, 1962.

THE PEOPLE &c.,

Respondent,

vs.

FLOYD DINAN, & ORS.,

Appellants.

BE IT REMEMBERED, That on the 7th day of March in the year of our Lord one thousand nine hundred and sixty-two Floyd Dinan, & ors., the appellants in this cause, came here unto the Court of Appeals, by Richard J. Burke, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgments of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—

in said cause, afterwards appeared in said Court of Appeals by Leonard Rubenfeld, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Richard J. Burke, of counsel for the appellants, and by Mr. James J. Duggan, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeals herein there were presented and necessarily passed upon questions under the Constitution of United States, viz.: (1) Whether the admission in evidence against the defendants by the trial judge of intercepted telephone conversations obtained by wire-tapping violated any rights had by defendants under so much of Article VI, Clause 2 of the Constitution of the United States as provides that the laws of the United States shall be the supreme law of the land, and whether the convictions so obtained violated the defendants' rights to due process of law and the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States;

(2) Whether the denial of the application during trial by all three defendants that the defendants Dinan and Bricker be represented from that point on by an attorney other than the attorney who had until then represented all three defendants, upon the ground that there might be a conflict of interest between the defendants, deprived all three defendants of counsel of their own choosing, and effective representation by counsel, and violated their rights to

due process of law and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States. This Court held that no rights of the defendants under Article VI, Clause 2 of the Constitution of the United States or the Fourteenth Amendment of the Constitution had been violated or denied.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Westchester County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be affirmed &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Westchester County, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court, before the Judges thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, MAY 17, 1962.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
(SEAL.) Clerk.

APPENDIX B

Opinions of the Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* FLOYD DINAN, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FRANK POPLEES, Also Known as FRANK DAY, True Name FRANCIS W. DAY, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ALBERT BRICKER, Appellant.

Argued March 29, 1962; decided May 17, 1962.

VAN VOORHIS, J. In affirming the judgments of conviction of these defendants on gambling indictments, we consider that the intercepted telephone conversations on which these convictions depend are not rendered inadmissible by recent Federal decisions. The other points raised do not require discussion. They have been examined carefully and resolved in favor of respondent.

In many criminal prosecutions evidence obtained by wire tapping authorized by orders granted under the New York State Constitution (art. I, § 12) and Code of Criminal Procedure (§ 813-a) has been introduced in criminal trials in New York State courts. In 1928 the United States Supreme Court held that the tapping of telephone wires is not in violation of the Fourth Amendment protecting against unreasonable searches and seizures (*Olmstead* v. *United States*, 277 U. S. 438, 465). In the opinion it was said: "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by

attributing an enlarged and unusual meaning to the Fourth Amendment."

Six years later, in June, 1934, section 605 of the Federal Communications Act was enacted in response to this suggestion. Section 605 was held to render wire-tap evidence inadmissible in the Federal courts in *Nardone* v. *United States* (302 U. S. 379) but to permit their introduction into evidence in trials in State courts (*Schwartz* v. *Texas*, 344 U. S. 199). That was the condition of the law when the United States Supreme Court was called upon in 1957 to decide *Benanti* v. *United States* (355 U. S. 96) which reaffirmed the doctrines enunciated in both *Nardone* v. *United States* and *Schwartz* v. *Texas*. The opinion in *Benanti*, by Chief Justice WARREN (p. 101), says concerning *Schwartz*: "The rationale of that case is that despite the plain prohibition of Section 605 [Federal Communications Act], due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." The *Schwartz* case was a wire-tapping case. The Supreme Court indicated in it that section 605 of the Federal Communications Act is violated by the procedure for obtaining wire taps prescribed by the New York Constitution and statutes, but made clear that such violations of this Federal statute are not sufficient to justify preventing the States from receiving such evidence in trials in State courts. The Federal statute itself contains no language forbidding the admission of such evidence in any courts. *Benanti, Nardone* and *Schwartz* held the means of obtaining such evidence to be illegal, but ruled that it was a question of policy of the forum whether the enforcement of section 605 of the Federal Communications Act should be implemented by imposing an exclusionary rule. Wire taps, it should be repeated, do not infringe constitutional immunity against unreasonable searches and seizures (*Olmstead* v. *United States, supra*). Exclusion of such

testimony was ordained in the United States courts as a policy measure to aid in the enforcement of section 605.

A contrary policy has been adopted in New York State (*People* v. *Variano*, 5 N Y 2d 391; *People* v. *Dinan*, 7 A D 2d 119, 6 N Y 2d 715), pursuant to the power reserved in the States by *Schwartz* v. *Texas* (*supra*).

Appellants argue that the decision in *Mapp* v. *Ohio* (367 U. S. 643), in 1961, deprived the States of the power reserved to them in *Schwartz* v. *Texas* (*supra*) to give effect to their own public policies in this regard. It is said that *Mapp* v. *Ohio* overruled *Schwartz* v. *Texas* by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by *Mapp* into the Fourth Amendment, which was held to have been mandated on the States (in this respect) by the Fourteenth Amendment to the Constitution of the United States.

The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure.

There is an indication that the Supreme Court of the United States adopted this distinction in deciding *Pugach* v. *Dollinger* (365 U. S. 548) in 1961, several months prior to deciding *Mapp* v. *Ohio* (*supra*). The determination of the Federal Court of Appeals in the Second Circuit (277 F. 2d 739) was affirmed by the Supreme Court in a memorandum decision citing *Schwartz* v. *Texas* (344 U. S. 199, *supra*) and *Stefanelli* v. *Minard* (342 U. S. 117). The *Pugach* case involved a Federal injunction sought against proceedings in a State court, to be sure, and *Stefanelli* v. *Minard* held that the Federal courts would not ordinarily restrain the State courts from receiving illegally obtained evidence in advance of trial. *Pugach* could have been de-

cided exclusively on that theory, as Justice BRENNAN pointed out in his concurring memorandum by voting to affirm on the authority of *Stefanelli* alone. But in the face of that the majority affirmed both on that theory and on the rationale of *Schwartz* v. *Texas*. We thus have a clear and authoritative decision by the Supreme Court, on the eve of *Mapp* v. *Ohio*, reaffirming the *Schwartz* doctrine that State-obtained wire taps may be admitted into evidence in criminal trials in State courts notwithstanding section 605 of the Federal Communications Act. Is it, then, to be assumed, that the Supreme Court in *Mapp* meant to overrule *Pugach* without citing it insofar as *Pugach* reaffirmed *Schwartz*, or was the intention of the Supreme Court in deciding *Mapp* v. *Ohio* to limit its application to situations where evidence has been obtained unconstitutionally by unreasonable search and seizure (which wire taps are not) without intending to render inadmissible in State courts all illegally obtained evidence where the Constitution has not been violated but only a Federal statute or rule? So, at least, the Second Circuit seems to have thought in *Williams* v. *Ball* (294 F. 2d 94, 96), where that court stated: "We do not read *Mapp* v. *Ohio*, 1961, 367 U. S. 643, * * * as overruling sub silentio Schwartz v. Texas—on which six Justices had expressly relied, only four months earlier, in the per curiam affirmance, 1961, 365 U. S. 458, * * * of our decision in *Pugach* v. *Dollinger*, 2 Cir., 1960, 277 F. 2d 739."

It needs to be borne in mind that nothing in the Fourth Amendment or section 605 of the Federal Communications Act expressly renders any evidence inadmissible. The exclusionary rule of *Weeks* v. *United States* (232 U. S. 383), was adopted for the Federal courts not because it was thought at the time that the Fourth Amendment required it, but for the reason that the Supreme Court considered it to be the most effective means of enforcing the constitutional prohibition against unreasonable search and

seizure. This was recognized in *Wolf* v. *Colorado* (338 U. S. 25), as the basis for allowing the State courts to receive unconstitutionally obtained evidence. Neither does section 605 of the Federal Communications Act contain language precluding evidence obtained in violation thereof. For reasons of high governmental policy, the exclusionary rule has been deemed in *Mapp* to be binding on the States to aid in the enforcement of the fundamental law. *Pugach* indicates that the same sanction may not be applied to the enforcement of a Federal statute or rule (cf. *Williams* v. *Ball, supra; Bolger* v. *Cleary*, 293 F. 2d 368). Unless and until the Supreme Court decides otherwise we shall follow our prior decisions in *People* v. *Variano* (*supra*); *People* v. *Dinan* (*supra*), and the Federal Court of Appeals in the Second Circuit in *Williams* v. *Ball* (*supra*).*

FULD, J. (dissenting). There can no longer be any doubt that section 605 of the Federal Communications Act is violated when a person—whether private individual or law enforcement official—taps telephone wires and discloses the contents of intercepted communications. (See *Benanti* v. *United States*, 355 U. S. 96, 105-106, n. 19; *Pugach* v. *Dollinger*, 277 F. 2d 739, affd. 365 U. S. 458.) Consequently, whether or not the decision in *Mapp* v. *Ohio* (367 U. S. 643), actually compels State courts to exclude evidence obtained in deliberate contravention of the Fed-

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* *Nardone* and *Benanti* were decided as a matter of Federal policy rather than directly in pursuance of the command of the statute. Not without significance is the analogy with *McNabb* v. *United States* (318 U. S. 332) and *Mallory* v. *United States* (354 U. S. 449), where it was held—without basing the ruling on the Constitution—that confessions were inadmissible in Federal court if obtained during an interval while a defendant was being held without prompt arraignment. Since this rule was not based on any constitutional mandate, it was held not to constrain the State courts (*Gallegos* v. *Nebraska*, 342 U. S. 55). Of course the confession would be inadmissible in the State courts if it were coerced in violation of the constitutional inhibition arising from due process of law.

eral statute, we should forthrightly hold, despite prior decisions (see, e.g., *People* v. *Variano*, 5 N. Y. 2d 391), that its use in the courts of New York is barred as a matter of New York law.

We have here the unusual circumstance that it is the very introduction of the wire-tapping evidence in open court, the very disclosure of the intercepted communication to the jury, which violates the Federal statute and constitutes the Federal crime. (See *Benanti* v. *United States*, 355 U. S. 96, 100, *supra*.) At the very least, a regard for "the imperative of judicial integrity" (*Elkins* v. *United States*, 364 U. S. 206, 222), commands exclusion of such evidence. Not alone the purposes of the exclusionary rule—the deterrence of law enforcement officials from violating the law they are sworn to uphold and engendering respect for constitutional guarantee and statutory mandate—but, even more important, the necessity to avoid commission of a criminal act within the very room where the trial is being held demand that evidence obtained in violation of the Federal Communications Act be ruled inadmissible.

The circumstance that adoption of a rule excluding such testimony may, as I noted, in a somewhat different context, in *People* v. *Lanz* (10 N Y 2d 347, 357, concurring opinion), "make it more difficult for police or prosecutors to gain convictions does not warrant its rejection. What is significant and decisive is that 'the imperative of judicial integrity' demands that the court should give sanction neither to illegal enforcement of the criminal law nor to the corrosive doctrine that the end justifies the means."

I would reverse the judgment appealed from and direct a new trial.

Judges Dye, Froessel and Foster concur with Judge Van Voorhis; Judge Fuld dissents in an opinion in which Chief Judge Desmond and Judge Burke concur.

Judgments affirmed.

APPENDIX C

Memorandum Opinion of the Appellate Division

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. FLOYD D[illegible]N, Appellant. THE PEOPLE OF THE STATE OF NEW [illegible]RK, Respondent, v. FRANK POPLEES, Also Known as FRANK DAY, True Name FRANCIS W. DAY, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. ALBERT BRICKER, Appellant. (Consolidated Appeals.)—(1) Appeal by defendant Floyd Dinan from a judgment of the County Court, Westchester County, rendered June 20, 1960, after a jury trial convicting him of conspiracy to commit the crime of book-making (one count) and of book-making (seven counts), and on each count sentencing him to serve a term of four months in the County Penitentiary (the terms to run concurrently) and to pay a fine of $500 (the fines aggregating $4,000 on the eight counts). Judgment affirmed. The denial of the motion for a new trial based on the posttrial recantation statement of the witness Atamanchuk, was proper; and it was also a proper exercise of discretion to deny such motion without a hearing. There is no question that the identification of the voice of defendant on the tapes was accurate. The identification was corroborated by other evidence. The trial court did not give credence to the posttrial statement. Hence, there was insufficient proof of defendant's claim that the People knowingly permitted Atamanchuk to testify falsely without correcting his testimony. Nor was it error for the trial court to refuse defendant's request to examine (1) Atamanchuk's pretrial statement to the District Attorney, (2) his testimony before the Grand Jury, and (3) the report of handwriting expert Hilton, dated May 17, 1956. Our examination shows that there is nothing in the statement or in the testimony or in the report which is inconsistent with the testimony of the witnesses on the trial, or which could be helpful to the defense in the cross-

examination of the witnesses. Furthermore, the necessities of appropriate law enforcement required that the statement and testimony be kept secret and confidential (*People* v. *Rosario*, 9 N Y 2d 286; *People* v. *Turner*, 10 N Y 2d 839). The denial of the request, on the fifth day of trial, that defendant be represented by counsel other than counsel for defendant Day, was not error. After the commencement of a trial the right to change counsel is not absolute but qualified, and is a matter within the discretion of the trial court (*United States* v. *Mitchell*, 138 F. 2d 831, cert. denied 321 U. S. 794; *United States* v. *Paccione*, 224 F. 2d 801, cert. denied 350 U. S. 896; *People* v. *Hyde*, 3 A D 2d 854; *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940, cert. denied 360 U. S. 937). A proper exercise of discretion does not deprive a defendant of his constitutional rights (*People* v. *Brabson*, 308 N. Y. 694). A reversal may be had only upon a showing that defendant was prejudiced by the denial of his request for change of counsel. No such showing of prejudice is made here. There is no claim that defendant's defense was not adequately presented; nor is there any suggestion now made as to any additional line of defense or any other evidence. The wiretapping evidence obtained pursuant to court order under section 813-a of the Code of Criminal Procedure was properly admitted in evidence, even if it be assumed that such evidence was obtained and divulged in violation of section 605 of the Federal Communications Act (U. S. Code, tit. 47, § 605). (*Schwartz* v. *Texas*, 344 U. S. 199; *People* v. *Saperstein*, 2 N Y 2d 210, cert. denied 353 U. S. 946; *Pugach* v. *Dollinger*, 365 U. S. 458; *People* v. *Dinan*, 7 A D 2d 119, affd. 6 N Y 2d 745, cert. denied 361 U. S. 839.) Nothing in *Mapp* v. *Ohio* (367 U. S. 643) either overrules the authorities cited or makes the evidence inadmissible upon trial in a State court (*Williams* v. *Ball*, 294 F. 2d 94). (2) Appeal by defendant Frank Poplees from a judgment of the County Court, Westchester County, ren-

dered June 20, 1960 after a jury trial, convicting him of conspiracy to commit the crime of book-making (one count) and sentencing him to serve a term of six months in the County Penitentiary, and to pay a fine of $500. Judgment affirmed. There was sufficient evidence of identification of the voice of defendant to make the tapes admissible in evidence (*People* v. *Dunbar Contr. Co.*, 215 N. Y. 416; *People* v. *McDonald*, 177 App. Div. 806). The remoteness of the personal conversations between the identifying witness and defendant from the time of the voice identification affected the weight rather than the competency of the evidence. As the trial progressed, the evidence of the voice identification, taken in connection with the corroborative evidence, justified the jury in finding that such identity was established beyond a reasonable doubt. (3) Appeal by defendant Albert Bricker from a judgment of the County Court, Westchester County, rendered June 20, 1960 after a jury trial, convicting him of conspiracy to commit the crime of book-making (one count) and of book-making (one count), and on each count sentencing him to serve a term of six months in the County Penitentiary (the terms to run concurrently), and to pay a fine of $500. Execution of so much of the sentence as imposed imprisonment was suspended, and defendant was placed on indefinite probation. The total fine of $1,000 was paid. Judgment affirmed. (See *People* v. *Dinan*, decided herein, 15 A D 2d 786.) Beldock, P. J., Ughetta, Kleinfeld, Christ and Brennan, JJ., concur.

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FILED
SEP 21 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 308

FLOYD DINAN, FRANK POPLEES, also known as FRANK DAY, true name FRANCIS W. DAY, and ALBERT BRICKER,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1962

No. .....

FLOYD DINAN, FRANK POPLEES, also known as FRANK DAY, true name FRANCIS W. DAY, and ALBERT BRICKER,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

This is the respondent's brief in opposition to a petition by Floyd Dinan, Frank Poplees, also known as Frank Day, true name Francis W. Day (hereinafter referred to as Day), and Albert Bricker, the petitioners, that a writ of certiorari issue to review a judgment of the Court of Appeals of the State of New York (Appendix A, *infra*), which affirmed, by a vote of four to three, a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which affirmed judgments of the County Court of the County of West-

chester, State of New York, convicting all three petitioners of conspiracy to violate Sections 986 and 987, New York Penal Law, prohibiting bookmaking and policy, and convicting Dinan and Bricker in addition of substantive violations of bookmaking.

The judgments were stayed on July 2, 1962, by Mr. Justice Harlan and bail continued pending the determination of this petition.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 17, 1962. On June 12, 1962, upon an application by the petitioners the remittitur was amended by the Court of Appeals to indicate that questions under the Constitution of the United States were presented to and decided by it. The remittitur is printed as Appendix A to the petition (p. 24).

The jurisdiction of this Court is predicated upon the provisions of the United States Code, Title 28, Section 1257 (3).

Questions Presented

1. Whether or not a conviction obtained in a New York State Court based upon the admission of wiretap evidence obtained under a court order pursuant to the Code of Criminal Procedure of the State of New York, Section 813a, violates the petitioners' rights under the Fourteenth Amendment to the United States Constitution.

2. Whether or not there is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution in refusing to permit defense counsel who had been representing the defendants for almost four years to withdraw in the midst of the criminal trial and have other counsel substituted for him.

Statutes and Constitutional Provisions Involved

U. S. C., T47, Sec. 605, Federal Communications Act

U. S. C., T47, Sec. 501, Federal Communications Act

N. Y. Code of Criminal Procedure, Secs. 8, 813a

N. Y. Constitution, Art. I, Secs. 6, 12

U. S. Constitution, Amendments IV, VI, and XIV

These statutory and constitutional provisions are printed either wholly or in appropriate part at pages 3-7 of the petition.

Opinions Below

The prevailing and dissenting opinions of the Court of Appeals of the State of New York are reported at 11 N. Y. 2d 350 and are printed in the petition at page 26; the opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 15 A. D. 2d 786 and is printed in the petition at page 32.

Statement of the Case

All three petitioners were convicted on June 20, 1960 of conspiring from October 1955 to December 8, 1955 to violate Secs. 986 and 987, New York Penal Law, prohibiting bookmaking and policy, a misdemeanor (New York Penal Law, Sec. 580). Dinan and Bricker were also convicted on indictments charging substantive violations of bookmaking, all misdemeanors. They were sentenced as follows: Dinan, four months imprisonment, and fines totaling $4,000; Day, six months imprisonment, and a fine of $500; Bricker, six months imprisonment, the execution of which was suspended, and fines totaling $1,000.

Pursuant to Section 813-a of the New York Code of Criminal Procedure, court orders were signed which authorized the tapping by the Westchester County Sheriff's Office of telephones at ten different locations in the City of Yonkers. Thereafter Deputy Sheriffs tapped such telephone lines for approximately two months in the latter part of 1955, listened to the conversations taking place over such lines, and recorded the conversations on reels of tape. These Deputy Sheriffs testified concerning such wiretapping at the trial herein, and identified the reels of tape, which were placed in evidence over objection, and hundreds of conversations thereon were then played on a playback machine, and testimony was adduced to identify the voices of the participants in such conversations. These recordings disclosed that the participants in the conversations during the time the telephones were tapped were engaged in taking bets on sporting events. The voices of Dinan and Bricker (among others) were each identified by respondent's witness in about fifty of such conversations, and the voice of Day was identified in four conversations. As a result of what they heard over the wiretaps the Deputy Sheriffs conducted simultaneous raids on the various premises involved, secured corroborating documentary evidence, and apprehended a number of persons.

It is undisputed that the wiretaps constituted the basic evidence in the case, and without them the convictions could not have been obtained. Their admission in evidence was objected to at the trial as being in violation of the petitioners' constitutional rights under the Supremacy Clause and the Fourteenth Amendment (R. 453 455, 462, 477, 1128, 1130), and this was also argued and briefed in the Appellate Division and the Court of Appeals.

The indictments against petitioners were consolidated for trial. The trial commenced on February 4, 1960 and continued for eight weeks until March 31, 1960 when the jury's verdict was returned. A Mr. Cribari appeared as attorney for the three petitioners (as well as for two other

defendants as to whom the jury disagreed). He had represented them for some four years prior to the trial. February 4 and February 5 were devoted to selecting the jury. February 6 and 7 were Saturday and Sunday, and the trial was in recess. The District Attorney's opening statement was made on February 8th. Petitioners contend that there was some indication in that opening statement that the evidence against Day would differ in character from that against Dinan and Bricker. The only reference to Day therein is at page 191 of the record, and it is submitted that no such indication exists.

Thereafter three witnesses were heard and Mr. Cribari made certain very broad stipulations concerning their testimony (241-243, 257, 270). Then on the morning of February 10th Mr. Cribari informed the Court that he had procured a stenographic transcript of the prosecutor's opening statement in order to study it, and that the prosecutor had permitted him to examine certain typewritten transcriptions of the wiretaps to be offered in evidence, as a result of which he had come to the conclusion that "There may very well be a conflict of interest between several of the defendants whom I represent" (R. 274-5).

He stated that he had advised his clients that it was to their interest that certain of them be represented by other counsel, and that petitioners Dinan and Bricker (and another person he was representing named Castellucci) "desire to have separate counsel and that they have employed Mr. Joseph Delaney of the New York Bar who is in the courtroom to act in their behalf". The Court was requested to examine the jury as to whether any of them were acquainted with Mr. Delaney, and after such a *voir dire*, to permit Mr. Delaney to be seated at the counsel table and to represent Dinan and Bricker (and Castellucci) from that point on (R. 275). Mr. Cribari said that the reason for his concern was that he had to determine whether one or more of the defendants ought to take the stand to testify in his own defense, and that if he did so

he might have to testify to something that might injure one of the other defendants (R. 277).

At the afternoon session Mr. Cribari requested that Mr. Delaney be permitted to sit with him at the counsel table and assist him. The court, after ascertaining from the jurors that none of them knew Mr. Delaney, granted this last application, stipulating however that Mr. Delaney would "not be permitted to participate in the trial on behalf of any of the defendants" (R. 287).

At the conclusion of the testimony counsel moved for a mistrial because of the denial of the application for the substitution of Mr. Delaney (R. 2183); and after the verdict written motions to set it aside were filed on behalf of Dinan and Bricker (R. 2468, 2471), on the ground that the refusal to allow them to be represented by counsel of their own choosing under the circumstances deprived them of a fair trial, and on behalf of Day (R. 2466), on the ground that the refusal to allow his counsel to withdraw as counsel for three other defendants, when he is supposed first to have discovered a possible conflict of interest, deprived Day of a fair trial.

In the course of this trial it was established that the Day-Dinan syndicate accepted bets on horseraces (R. 2001), sporting events of various kinds (R. 1657) and policy (R. 2091), through their various personnel not only in the city of Yonkers but throughout the major portion of Westchester County. That this was a far flung organization cannot be speculated upon. No fewer than five sheetwriters were shown to have been taking bets (R. 348, 846, 864, 884, 889-891); and according to expert testimony (R. 2000) each such sheetwriter accepts bets for the syndicate from at least two dozen or more half sheet men or agents, each of whom, as the local contact with the bettor, serves countless numbers of bettors.

The trial testimony indicated that on the day of the raid in question there had already been accepted by the

syndicate in excess of $4,700 in bets which represented only a part of the day's play. The annual volume of illegal betting ran into millions of dollars annually. The evidence clearly established that this was no small operation, but a syndicated gambling ring of major proportions which was even negotiating to expand the scope of its operation into the metropolitan area of New York City (R. 1422-1426).

This Writ Should Not Be Granted

Question 1

(Replying to the questions enumerated by the petitioners as #1, 2, 3, 4, and 5.)

The petitioners contend that *Mapp* v. *Ohio*, 367 U. S. 643, mandates the finding that wiretap evidence is illegally procured evidence and hence is inadmissible even in state courts. They base this contention on the devious and circumlocutory route of elevating the Federal Communications Act, § 605, to equal dignity with the Bill of Rights of the Constitution of the United States. It seems unnecessary to point out that no statute can aspire to such a status. One need look no further than Article V of the United States Constitution and see the calculated difficulty which attends amending the Constitution to realize that a constitutional prohibition far outweighs a statutory prohibition. Nevertheless, the petitioners seek to equate the two because only by such equation can they hope to be successful.

We respectfully call the attention of the Court to its holding in *Mapp* v. *Ohio*, *supra*, to point out that its language leads to the logical conclusion reached by the New York Court of Appeals, i.e., that the *Mapp* case was solely concerned with invasions of a *constitutionally* given right. This seems to be the point of what is suggested to be the

operative portion, indeed the essence of the *Mapp* decision, 6 L. ed. 1081, 1090:

> "We hold that all evidence obtained by searches and seizures *in violation of the Constitution* is, by that same authority, inadmissible in a state court." (Emphasis supplied)

This suggestion is lent support not only by the Court's recurring references to constitutional questions, but by the selection of cases cited therein and perhaps most of all by the Court's expressed intention of overruling *Wolf* v. *Colorado*, 338 U. S. 25, dealing with a purely constitutional matter.

If the question presently before this Court were a constitutional one, *Mapp* could not be less than controlling. It is the respondent's thesis, however, that this is not a constitutional question. The petitioners claim that it is so on the theory that any conflict between a state statute and a federal statute must be resolved by the dominance of the federal statute as prescribed by the United States Constitution, Article VI, Clause 2, i.e., the Supremacy Clause. That this is a particularly pernicious theory with potential results of the most far reaching magnitude is acknowledged even by the petitioners. They go on to say, Petition, page 12: "This is not the same as to say that every time a Federal statute is violated, the Constitution is violated." But that is precisely what they are saying because by invoking the Supremacy Clause against a state statute the petitioners are saying the state law is unconstitutional not because it is violative of the Constitution, but because of the mere happenstance of the existence of a conflicting federal statute. Thus potentially *every* federal statute has the capacity to be vested with the dignity of the United States Constitution. To view the same question from a different angle, each of the fifty state legislatures has the power to raise any federal statute to the level of a constitutional mandate, if the petitioners are

correct, simply by passing a state law which happens to be at variance with the federal law. This is so despite the clear abjuration by the framers of the Constitution of the casual amendment of that document, U. S. Constitution, Art. V.

The petitioners argue that the result, considered totally, of *Schwartz* v. *Texas*, 344 U. S. 199; *Benanti* v. *United States*, 355 U. S. 96; *Wolf* v. *Colorado*, 338 U. S. 25; *Stefanelli* v. *Minard*, 342 U. S. 117; and *Mapp* v. *Ohio*, 367 U. S. 643, compel the finding now that the instant case ought to be reversed. It is submitted that these cases must be considered in a more orderly fashion than that suggested merely by the accident of their having common facets. For that reason we here treat them chronologically in the belief that only in such treatment can their composite rationale be appreciated. To the cases which the petitioners cite we would also add *Olmstead* v. *United States*, 277 U. S. 438, the precursor to the whole array as they bear on the instant case, and *Weeks* v. *United States*, 232 U. S. 383, which gave life to them all.

Essentially, the *Weeks* case first established the principle that unconstitutionally seized evidence, viz.: evidence obtained through unconstitutional search and seizure, was inadmissible. The restriction was there limited to federal agents alone. Next came *Olmstead* v. *United States*, *supra*. In that case this Court was asked to hold that intercepted telephone communications fell within the *Weeks* proscription. It declined to do so, because, "There was no searching. There was no seizure." *Olmstead* v. *United States*, *supra*, page 464. This Court refused to characterize wiretapping as violating the protection against unreasonable search and seizure. With that decision in the year 1928, the two classes of cases, i.e., evidence obtained by unconstitutional search and seizure, and that gained by wiretapping, separated and began to wind their divergent ways towards this day and this case.

The next case was *Wolf* v. *Colorado*, 338 U. S. 25. There the Court held that the doctrine of *Weeks* v. *United States*, *supra*, was to be construed only as against federal officers, and laid down the principle that the exclusion of illegally seized evidence in a state court was not a part of the Fourth Amendment, but a policy of judicial administration over which federal courts should not exercise control despite the constitutional prohibition of *Weeks* and refused to invade the rights of each state to formulate its own rules of evidence and precluded the application of the Federal exclusionary rule to state courts.

Thereafter, *Stefanelli* v. *Minard*, 342 U. S. 117, held that the Federal Courts should not interfere collaterally in the trial in state courts of criminal cases. The Court stated in *dicta*, quoting from *Wolf* v. *Colorado*, *supra*, that such interference would be warranted if a state affirmatively authorized violation of the *Constitution*. The well established text set down by a long line of eminent jurists that the Fourteenth Amendment protects only fundamental rights from encroachment by the states should be adhered to. It is submitted that all these cases had to do with the question of *unlawful and unconstitutional* search and seizure, as defined in *Olmstead* v. *United States*, *supra*.

The extension of that time tested rule can only lead to havoc were it to now be extended to encompass not only constitutional guarantees, but also federal statutory provisions. To do so may well open the door to complete destruction of state sovereignty and state's rights. The mere passage of a federal statute, whether providently done, whether good or bad, could have the result of destroying the fundamental rights of the states, as well as each individual who makes up that state, and would leave the law of each state to the mercy of a particular Congress. This would go beyond anything envisioned by the framers of our Constitution and would have irreparably destructive results.

Then came *Schwartz* v. *Texas*, 344 U. S. 199. The petitioners suggest, Petition, page 13, that the ruling there abandoned the distinction made by *Olmstead* and was based upon *Wolf* v. *Colorado*, *supra*, exclusively. Plainly that is not so, since the dissenting opinion of Mr. Justice Douglas in *On Lee* v. *United States*, 343 U. S. 747, 762, upon which he based his dissenting opinion in *Schwartz* v. *Texas*, *supra*, page 205, says unmistakably that he would then have overruled the *Olmstead* case. It must therefore follow that the majority of the Court accepted *Olmstead* as the law. Thus, the physical intrusion test established by *Olmstead* was still the vital consideration, and *Nardone* v. *United States*, 302 U. S. 379, whereby in federal courts wiretap evidence was excluded must be regarded as having enunciated a rule of evidence on the theory that this Court has supervisory power over the Federal Court System in and for federal courts. This, then, was the sanction imposed upon federal officers for violation of federal law which Mr. Justice Murphy later thought so desirable in *Wolf* v. *Colorado*, *supra*.

The next case was *Benanti* v. *United States*, 355 U. S. 96. The holding there was unequivocally stated to be, page 100:

> "... the correct application of the above principle (wiretap evidence not be used to secure federal conviction) dictates that evidence obtained by means forbidden by Section 605, whether by state or federal agents, is inadmissible *in federal court*." (Parenthetical comment and emphasis added.)

This holding is entirely consistent with the rule of evidence theory of *Nardone*. It is not inconsistent with *Olmstead* and specifically the case did not overrule *Schwartz* v. *Texas*, *supra*.

Finally came *Mapp* v. *Ohio*, 367 U. S. 643, with which the Court is too familiar to require any further discussion.

Thus in resume it is seen that in *Weeks* in 1913 the exclusionary rule was invoked for the first time against *unconstitutional* searches and seizures by federal agents. In 1928, however, *Olmstead* came along and held that telephone interception was not a violation of the Constitution. Therefore, the subsequent decisions in *Wolf* v. *Colorado, supra; Stefanelli* v. *Minard, supra,* and *Mapp* v. *Ohio, supra,* because they all deal with unconstitutional searches and seizures, are inappropriate to the instant case.

The other line of cases which descends from *Weeks* and *Olmstead, Schwartz* v. *Texas, supra; Nardone* v. *United States, supra;* and *Benanti* v. *United States, supra,* were all concerned with wiretap evidence. However, in terms of *Olmstead* this was not a constitutional question, so these cases may only be said to have enunciated a rule of evidence, that wiretap evidence is inadmissible *in federal courts.*

In this view of the governing precedents, *Pugach* v. *Dollinger,* 365 U. S. 458, was inevitable. Because the application was made to the federal court to enjoin the use in a state court of wiretap evidence, *Stefanelli* v. *Minard, supra,* was clearly in point, and the majority of the Court so held. The same majority, with the exception of Mr. Justice Brennan, felt also that *Schwartz* v. *Texas, supra,* also controlled, and they so stated.

It is therefore submitted that there is no essential conflict among *Mapp, Pugach, Schwartz,* and *Wolf.* They are brought to their seemingly divergent conclusions by the fact that they deal with two different problems, one a constitutionally guaranteed right, the other the force and effect to be applied to a federal statute. So the United States Court of Appeals reasoned in *Williams* v. *Ball,* 2d Circuit, 294 F. 2d 94, and this Court denied certiorari in that case. —— U. S. ——, 7 L. Ed. 2d 526.

In the respondent's view as it has been attempted to be set forth, *supra*, there is no sound basis for the petitioners' insistence that *Mapp* v. *Ohio*, *supra*, overruled *Schwartz* v. *Texas*, *supra*, as well as *Wolf* v. *Colorado*, *supra*. They nevertheless urge that it be reconsidered, and they offer reasons why its holding is no longer tenable.

Section 605, in and of itself, has never provided for the exclusion of wiretap evidence. It is submitted that in view of the problems inherent in this subject matter both from the standpoint of the privacy of the individual and the rights of society to be protected from criminal elements who would be able to operate with impunity by using telephone communications, this is far more appropriately a problem for the Congress to face up to. But in *Olmstead* v. *United States*, *supra*, this Court stated, page 465:

> "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence."

As noted, *Olmstead* was decided in 1928. When in 1934, Sec. 605 of the Federal Communications Law was passed, the conclusion seems inescapable that the Congress was attempting to protect the secrecy of telephone calls by statute because this Court had stated that at common law there was no such protection. However, despite the unmistakable expression of the law by the Court, *supra*, no "direct legislation" was incorporated into the law to make evidence obtained by its violation inadmissible. Furthermore, as this Court stated in *Nardone* v. *United States*, 302 U. S. 379, 381, the Congress had then resisted, as it still continues to resist, any attempt specifically to include law enforcement officers within the prohibition of Section 605 or to give statutory weight to the hypothesis that this evidence should be inadmissible.

It is submitted that *Schwartz* v. *Texas, supra,* has as much vitality now as it had in February, 1961, when it was specifically relied upon by six of the learned Justices of this Court in *Pugach* v. *Dollinger, supra.*

The respondent emphatically disagrees with each of the contentions put forth in the petitioners' Question 5. The essence of the *Olmstead* decision is to be found in the language of the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

The *Olmstead* Court construed that language to connote a physical intrusion, a physical search, and a seizure of physical material. The respondent cannot conceive that there is no longer any difference between a physical, tangible, space-occupying object and a spoken word which hangs for a moment on the air and then disappears forever. It was that very distinction which the Court drew which separated mailed material on the one hand and the spoken word on the other. It said, page 464:

> "It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search of the sender's papers or effects. The letter is a paper, an effect. . . ."

and as such, a thing of physical existence, it falls within the constitutional proscription.

Silverman v. *United States, supra,* rather than negating the *Olmstead* rule, reaffirms it. That case concerned a "spike mike", which involved a physical intrusion into the house or property of the defendant. This Court so held, not by distinguishing it from the *Olmstead* case, but by a determination that it fell precisely into the area which *Olmstead* had held to be violative of the Amendment.

Dealing then with the petitioners' claim that a telephone tap is a search for evidence, it is difficult to discover how that could be utilized in any manner to discredit *Olmstead's* authority, because, not to belabor the point, *Olmstead* deals with what is and what is not constitutionally prohibited. Surely the Constitution does not bar searches to discover evidence, for if it did, the right to search incidental to arrest would be seriously abridged. A fact not to be forgotten in the instant case is that the investigation and ultimately the several convictions were concerned with conspiracy. Therefore, regardless of what the authority for the wiretap orders was, the Westchester County Deputy Sheriffs were not listening to evidence alone; they were listening to a crime being committed. Furthermore, since this case and the *Mapp* case, the New York State Legislature has enacted legislation permitting a search for evidence. It is submitted that what this Court is being asked to do by the petitioners is to sweep away thirty odd years of well reasoned judicial precedent and to restore the law in this area to the *status quo* of the period prior to *Olmstead*, to redecide *Olmstead*, and to rechannel the law so as to bring it within the purview of *Mapp* v. *Ohio*, *supra*. They are asking this Court to preside at the shotgun marriage of constitutional rights and statutory law. It is respectfully submitted that the Court should decline to do so.

Because this case will be controlling law in the State of New York, if not in the United States, the respondent is compelled to call to the attention of the Court certain other considerations. It is said of wiretapping that it is "dirty business". But murder, and rape, and robbery and theft are also dirty businesses. And so is professional syndicated gambling. The technological developments which have emerged since the Second World War are quickly put to use by the criminal fraternity, and because these advances are so novel, legislation tends to fall behind them. The Court may be aware that in the county where

this appeal arose there was discovered in the spring of 1961 that an electronic device had been developed and put into use by the gambling element which would render a wiretap practically useless. The technical developments of the past twenty years have been extraordinary. If the prosecutive authorities have not been foreclosed from adopting equally sophisticated counter-measures, then their right to use them should be acknowledged.

It is submitted that mere listening to an intercepted telephone conversation is not a violation of section 605 of the Federal Communications Law, because the statute provides that there must also be divulgence of the overheard information. It is also submitted that Congress never intended to usurp the police powers of New York State when it passed the Federal Communications Law and that it was never the intention of the authors of the Constitution or of the Congress to permit the five percent which represents the criminally inclined population of this country to create a lawless anarchy which the remaining ninety-five percent are unable to control.

Question 2

(Which is in response to the questions enumerated by petitioners as #6 and 7).

It is submitted that some small background of this case is not inappropriate here. The petitioners were indicted in late 1956 and 1957. At that time they selected as their legal representation, Wolfgang E. Cribari, Esquire, of the law firm of Cribari, Scapolito and Solinger of Mount Vernon, New York. One of Mr. Cribari's first moves was to challenge the validity of the indictments on the ground that they had been secured on the basis of wiretap evidence. In this challenge he was successful, and the indictments were ordered to be dismissed. *People* v. *Dinan*, 15 Misc. 2d 211. The People appealed this order to the Supreme Court, Appellate Division, Second Judicial De-

partment, and were successful. The indictments were ordered to be reinstated (7 A. D. 2d 119). The petitioners then appealed the order of the Appellate Division to the New York Court of Appeals where the order reinstating the indictments was affirmed (6 N. Y. 2d 715). Thereafter, an application was made to this Court for a writ of certiorari which was denied, *Dinan* v. *New York*, 361 U. S. 839. This entire gamut of legal maneuvering consumed no less than two years, and throughout that period of time the petitioners were continuously represented by Mr. Cribari. Mr. Cribari was also counsel to these defendants when they went to trial and consumed two days in an unsuccessful endeavor to obtain a jury to try this case in the summer, and consented to have the case marked over to the fall term. On February 4, 1960, this case went to trial and Mr. Cribari represented five of the seven defendants, two having in the interim retained other counsel.

The jury was not fully selected and sworn until February 5, at 3:10 p.m. Thereafter the Assistant District Attorney opened to the jury and thereafter Mr. Cribari made several motions directed to that opening. Thereafter Deputy Sheriff Arthur L. Thela testified to the installation of several telephone interception devices and Deputy Sheriff Kurt Fennhahn testified to having monitored certain of such devices as did Deputy Sheriff Paul J. Black. Thela was examined on *voir dire* by Mr. Cribari. With regard to taped conversations so intercepted and monitored, Mr. Cribari made certain fairly broad stipulations on behalf of each of his defendants. On February 10, 1960, the fifth day of the trial, Mr. Cribari requested permission to withdraw from the defense of the petitioners Dinan and Bricker and to have substituted in his stead Joseph L. Delaney, Esq. The reason given for this proposed substitution of counsel was Mr. Cribari's apprehension that "there may very well be a conflict of interest between several of the defendants" whom he represented. The People opposed such a substitution on the grounds

that it might irretrievably prejudice their case and the request was denied. Mr. Delaney was permitted to sit at counsel table, however, with the proviso that he not actually engage in the trial of the case.

At page 19 of the Petition and in the footnote on page 21 it is suggested that one or more of these petitioners might have chosen to testify had they been represented by counsel other than Mr. Cribari. The fact however remains that none of these defendants elected to take the stand nor did they have any intention of so doing. This trial consisted mainly in the playing of tapes of the voices of these and other defendants, and the trial took two months. In his summation to the jury, Mr. Cribari conceded that the tapes had proved a criminal conspiracy; his only point was one of identity. He claimed that the defendants had no connection with it, and he excoriated the prosecution's witness whose testimony had consisted almost exclusively in identifying the voices on the tapes as those of the petitioners. In the New York Court of Appeals the same concession and the same argument was made. Yet it is now soberly suggested that one or more of the petitioners might have elected to testify. But within their first twenty words they would have established irretrievably their identities as the speakers on the tapes. It is submitted that this argument must be considered as a mere tactical gambit and in no sense is being put forward in good faith or as an example of prejudice.

To return, then, to the questions actually presented on this petition, it was contended by Mr. Cribari that "there may very well be a conflict of interest" (822), among the five defendants whom he represented. At no point did Mr. Cribari state that he had discovered any existing conflict of interest: he was merely speculating that one might possibly arise. It is undoubtedly true that no defense attorney should be compelled to point out where the conflict of interest may lie, *People* v. *Bopp*, 279 Ill. 184, 116

N. E. 679; but he should be compelled to give the Court his assurance that one in fact exists. Mr. Cribari did not do so. In fact his language can only be construed as indicating that *if* there was such a conflict, he was unaware of it, because his expression, "may very well be" is a total negation of his knowledge of current, pointed information.

To cut to the heart of this question, and to avoid the necessity of answering each and every case cited by the petitioners, the respondent freely concedes that when a man's life or liberty is in jeopardy it is unquestionably his right to select his own attorney. The question is when does good order dictate that this privilege end? At what point does his choice become binding upon him? Obviously there must be such a point, just as there comes a point when his choice of a surgeon becomes irrevocable. It is submitted that the option to retain new counsel ends when a trial or hearing of the issue commences. No case which the petitioners cite contravenes this thesis. Every case they cite insists that a defendant may select his own counsel *until a trial of the merits of the case begins.* After that the right becomes a qualified one which then falls within the discretion of the court. *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 943. This is not a new question to the Court. The *Hyde* case was denied certiorari, 360 U. S. 937, as were *United States* v. *Mitchell*, 138 F. 2d 831, 321 U. S. 794; and *United States* v. *Paccione*, 224 F. 2d 801, 350 U. S. 896. Specifically to deal with *Mitchell* the Court of Appeals held that in the absence of a statement by the defendant that he chose thereafter to represent himself it required the conclusion that he wanted to be represented by another attorney, and on this state of facts the Court concluded that the refusal of the trial court to grant the request was not an abuse of discretion.

Not to be overlooked in the instant case, either, is the fact that Mr. Cribari was selected by the petitioners. In

no manner of speaking can it be claimed that he was foisted upon them. He represented them for almost four years in this matter, and it is submitted that it is incredible that he became aware of the lurking possibility of a conflict of interest for the first time after the commencement of the trial approximately four years after his first acquaintance with the case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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